October 9, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: State of New York

Date of Filing: September 11, 2008

Case Number: TFA-0274

This Decision concerns the State of New York's (New York) Appeal from a determination that the Department of Energy's Office of Electricity Delivery and Energy Reliability (OE) issued to it on August 8, 2008. In that determination, the OE responded to New York's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. In its determination, the OE withheld information in four documents under FOIA Exemption 5. If we grant this Appeal, the OE may not withhold the information under FOIA Exemption 5.

I. Background

New York filed a request with the OE for correspondence the DOE had with CRA International and transmission developers or stakeholders regarding an August 2006 Congestion Study and an October 2007 National Interest Electric Transmission Corridor [NIETC] Designation Order. Determination Letter. The OE provided more than 33 responsive documents in a numbered index. The documents consist of e-mails and memoranda among the OE, CRA International, and additional consultants. The OE redacted four of the documents pursuant to Exemption 5, Documents 1, 2, 2(b), and 3. *Id*.

New York then filed the present Appeal with the Office of Hearings and Appeals (OHA). Appeal Letter. New York advances five arguments to show that the OE improperly withheld information under Exemption 5. First, New York contends that the DOE waived its exemption claims to the extent that the DOE already officially disclosed the documents to the public. Second, New York contends that the OE may not withhold any of the information under Exemption 5 because it does not contain predecisional, deliberative communications. Third, New York contends that the OE applied Exemption 5 too broadly; the OE must disclose non-exempt, segregable facts. Fourth, New York contends that if "pre-decisional positions were adopted by DOE as a part of its final

action, that information is subject to disclosure." Finally,[1] New York contends that disclosing all of the withheld information is in the public interest. *Id*. We address New York's arguments in turn.

II. Analysis

The FOIA requires federal agencies to disclose information upon request, unless it falls within enumerated exemptions. 5 U.S.C. §§ 552(a), 552(b)(1)-(9); *see also* 10 C.F.R. §§ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly, to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Waiver

New York argues that if the OE has disclosed any of the withheld information to the public, it has waived its claim of exemption. Appeal Letter.

An agency waives a valid exemption claim when it has "officially acknowledged" a document. An official acknowledgment must meet three criteria. First, the information requested must be as specific as the information previously disclosed. Second, the information requested must match the information previously disclosed. Third, the information requested must already have been made public through an official and documented disclosure. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). We read "an official and documented disclosure" to mean an authorized disclosure. *EverNu Tech., LLC*, 30 DOE ¶ 80,112 (Case No. TFA-0243) (Mar. 5, 2008).[2]

A requester asserting a claim of prior disclosure has the initial burden of identifying specific information in the public domain that appears to duplicate the information that the agency is withholding pursuant to an exemption. *Wolf*, 473 F.3d at 378. A requester cannot rely on mere speculation. *Id*.

New York has not met its initial burden; it has not identified specific information in the public domain that appears to duplicate the information that the OE withheld. Therefore, we may not find that the OE waived its claim of exemption.

[1] New York also appealed "DOE's failure to timely respond to the State's December 2007 FOIA request." Appeal Letter. The DOE FOIA regulations do not allow OHA to review the timeliness of the determination issuer's response. If New York properly submitted a FOIA request and an authorizing official did not respond within the statutory deadline, it has a right of review in federal court. *See* 10 C.F.R. §§ 1004.5(d)(1)-(4).

[2] OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp.

B. Exemption 5

New York argues that the OE improperly withheld information under Exemption 5 because the withheld information does not contain predecisional, deliberative communications. *See* Appeal Letter.

1. Authority

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, [information] must . . . satisfy two conditions: [1] its source must be a Government agency, and [2] it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Klamath*, 532 U.S. at 8.

Information satisfies *Klamath*'s first condition if it is an inter-agency or intra-agency communication. *Id*. at 9 (citing 5 U.S.C. § 552(b)(5)). The statutory definition of "agency" is broad, and includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent regulatory agency." *Klamath*, 532 U.S. at 9 (citing 5 U.S.C. § 552(f)). Information prepared outside the government by a government consultant qualifies as an "intra-agency" communication except when the consultant urges the agency to support a position "that is necessarily adverse to the interests of [the consultant's] competitors." *Id*. at 14.

Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," including the deliberative process privilege. *Id*. at 8 (citations omitted). An agency may withhold information under the deliberative process privilege if it is "predecisional" and "deliberative." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "[Information] . . . is 'predecisional' if it precedes, in temporal sequence, the 'decision' to which it relates." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We "must be able to pinpoint an agency decision or policy to which the [information] contributed." *Id*. Conversely, information which explains actions an agency has already taken is not predecisional. *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980). Information may lose its predecisional status "if it is adopted, formally or informally, as the agency position. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Id*. The agency must identify the role the information plays in that process. *Hinckley*, 140 F.3d at 284 (citation and internal quotation marks omitted). We "ask . . . whether the information is so candid or personal in nature that public disclosure is likely . . . to stifle honest and frank communication within the agency. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id*.

The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp.*, 617 F.2d at 866.

The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

2. Whether the Information that the OE Withheld Contains Predecisional, Deliberative Communications

New York argues that the OE improperly withheld information in each of the documents under Exemption 5 because that information does not contain predecisional, deliberative communications. *See* Appeal Letter.

We find that the OE properly withheld the information in each document, except the information in Document 2(b), as detailed below. The documents are predecisional because they were created in March 2006 – before the DOE issued the August 2006 Congestion Study and October 2007 Designation Order.

The withheld information in Documents 1 and 2 is also deliberative. It consists of the same e-mail, instructing DOE employees and consultants how to assemble a table of commenters' remarks. Although the instructions do not substantively discuss any particular comment, they recommend how DOE employees and consultants should process the information. Therefore, the information is deliberative because it influences substantive choices in the policy-making process.

The withheld information in Document 3 is similarly deliberative. It is an e-mail suggesting that DOE employees and consultants discuss a particular issue at an upcoming meeting. The information is deliberative because the consultant's suggestion is a policy choice to examine that issue.

Lastly, some of the withheld information in Document 2(b) is deliberative and some of it is not. Document 2(b) consists of a table. Each of the ten pages lists commenters. The first and second pages contain deliberative information. They feature column space to briefly summarize commenters' definitions "of a corridor designation," and allow for the

categorization of commenters' responses. On both pages, the columns categorizing commenters' responses feature check marks, and on the first page, the column space for summaries of commenters' definitions is filled in. This information is deliberative because the check marks and summaries reflect how DOE employees and consultants evaluated the information. The commenters' names on the first and second pages are not deliberative and therefore consist of segregable factual information, as detailed below.

3. Segregability of Factual Information

Even if the FOIA exempts documents from disclosure, non-exempt information that is "reasonably segregable" from those documents must be disclosed after the exempt information is redacted. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)).

We carefully reviewed the withheld information and found non-exempt, segregable information in Document 2(b). As discussed above, the OE properly withheld the columns on the first and second pages of Document 2(b) consisting of summaries and categorizations of commenters' responses. Without this information connecting the commenters' names to particular responses, the commenters' names are purely factual and therefore segregable. We find that the commenters' names on pages one and two consist of segregable factual information that the OE may not withhold under Exemption 5.

Similarly, we find that the OE may not withhold pages three through ten of Document 2(b) under Exemption 5. Those pages do not have columns that list DOE employees and consultant's summaries of comments or their categorization of comments. Instead, those eight pages merely include columns for categories labeled "Criteria 1" through "Criteria 8" and "Other." The document does not explain the criteria. Moreover, the columns are blank. As a result, these eight pages do not reflect the policy opinions or reflections of DOE employees and consultants. Therefore, we find that pages three through ten consist of segregable factual information that the OE may not withhold under Exemption 5.

4. Whether the OE Adopted the Withheld Information as an Agency Position

As stated above, information may lose its predecisional status "if it is adopted, formally or informally, as the agency position. . . ." *Coastal States Gas Corp.*, 617 F.2d at 866. New York asks us to consider whether the information that the OE withheld has lost its predecisional status.

We find that it has not. The information does not consist of an agency position; it consists of a series of instructional e-mails and a table contributing to one or more agency positions. Therefore, we find that the OE cannot have adopted it as an agency position.

C. Discretionary Public Interest Disclosure

The DOE regulations provide that the DOE should release information exempt from mandatory disclosure under the FOIA if federal law permits disclosure and disclosure is in the public interest. 10 C.F.R. § 1004.1.

In this case, the release of the predecisional, deliberative information that the OE withheld could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. We do not believe that discretionary release of the properly withheld material would be in the public interest. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 (Mar. 18, 1987) (Case No. KFA-0080).

It Is Therefore Ordered That:

(1) The Appeal filed by the State of New York, Case Number TFA-0274, is hereby denied regarding Documents 1, 2, and 3. It is granted in part regarding Document 2(b), as set forth below, and denied in all other respects.

(2) In Document 2(b), the OE must either disclose pages three through ten and the commenters' names on page two, or issue a new determination, justifying their withholding.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 9, 2008